IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL WRIT No. 617 of 1993

THE EAST INDIA HOTELS LTD. & ANR
V/S
STATE & ORS

Mr. JP JOSHI, for the appellant / petitioner

Mr. KL THAKUR, A.A.G, for the respondent

Date of Order : 5.1.2007

HON'BLE SHRI N P GUPTA,J.

REPORTABLE

JUDGMENT

This writ petition has been filed by the lessee, alleging inter alia that by lease deed dt. 17.12.1992 one Lake Palace Hotels & Motels (P) Ltd., hereafter referred to as the lessor, the petitioner took on lease the land mentioned in para-6 of the rent deed for a term of 72 years. The rent stipulated to be paid during the lease period has been reproduced in para-6 of the writ petition. The lease was obtained for the purpose of constructing, and operating hotel/motels. The construction was to be in conformity with the rules and regulations, and other bye-laws. The cost of the construction was to be incurred by the petitioner. Then, in Clause 15 of the lease deed, copy whereof has been produced vide Annexure-1, it was stipulated that lessee shall keep deposited with the lessor

an advance lease deposit of Rs. 2.5 Crores, on the terms and conditions mentioned therein, which include the mode of the receipt by the lessor. The amount was to carry simple interest @ 9% per annum, and repayment is to be made in ten yearly instalments of Rs. 25 lacs each, to commence from 1.5.2055. Then, in Clause 15.4 it was undertaken by the lessor to pay promptly the interest and the yearly instalments as and when due, failing which lessee was entitled to adjust the instalments and interest due from the lease rent. Likewise, it was also stipulated in Clause 15.5 that if for any reason the lease stands terminated prior to the date fixed, then the entire principal amount or any balance thereof due will be payable forthwith against surrendering of the lease property.

According to the petitioner, this lease deed was submitted for registration on 17.12.1992, along with a covering letter accompanied with legal opinion, a decision of the Delhi High Court, in Chief Controlling Revenue Authority Vs. M.P. Broker Company, reported in AIR 1980 Delhi-249. However, vide Annexure-3 dated 17.12.1992 the Sub Registrar (respondent no.4) informed, that the petitioner must deposit a further stamp duty of Rs. 25 lacs on the aforesaid amount of Rs. 2.5 Crores, as per Article 35(c) of the Schedule to the Indian Stamps Act, within 15 days, failing which the lease deed shall be produced before the competent authority, as inadequately stamped. According

to the petitioner, representations were made vide Annexures 4 and 5. The petitioner thereafter again submitted representation vide Annexure-7 dt. 4.1.1993, contending, that the amount of Rs. 2.5 Crores does not fall within "the money advanced" within the meaning of Article 35(c). Then, vide Annexure-8 dt. 19.1.1993, the petitioner was informed that the petitioner is liable to pay the duty amount of Rs. 25 lacs, and the demand of Sub Registrar was conveyed to be correct. Likewise vide Annexure-9 dt. 14.1.1993 the petitioner was called upon to pay the aforesaid amount, failing which reference shall be made under Section 47-A of the Act.

Assailing these actions, the writ petition has been filed inter alia contending, that the stamp duty has also been paid, as leviable on the basis of Article 35(a) of the Schedule, to the extent of Rs. 48,06,000/- + Rs. 50/- towards security bond. It is also contended that the term "money advanced" in Article 35(c) is to be read ejusdem generis, with the expression "fine" or "premium", and all these three expressions "fine" or "premium" or "money advanced" connote payments of money in addition to rent reserved, in consideration of grant of the lease, to the lessee, and are essentially non-refundable, which is not the case in the case in hand, as the amount is refundable, and is to carry interest @ 9%. It is contended that in view of the above, the threatened action under

Section 47-A is wholly unsustainable. With these grounds Annexures 3, 8 and 9 are sought to be quashed, and a restrain is claimed against the respondents from raising any demand for any stamp duty for the purpose of registration of lease deed.

This writ petition was filed on 27.1.1993, and was admitted on 2.2.1993, and vide order of the same date interim stay was granted, directing the respondents not to impound the instrument Annexure-1. Then, vide order dt. 25.5.1993 the stay application was finally disposed of, by directing the respondents to register and release the lease deed on furnishing a bank guarantee in the sum of Rs. 28 lacs, and stipulating that in case the writ petition is dismissed, the State will be entitled to interest on the amount at the rate of 12 % per annum.

A reply to the writ petition has been filed contesting the writ, and it was contended, that the condition contained in clause-15.4 clearly establishes, that it is stipulated that in the event of failure in repayment by lessor to lessee, the amount of Rs. 2.5 Crores can be adjusted against the lease rent. Therefore, it certainly falls under the definition of 'mortgage with possession' as defined in Section 2(17) of the Act. Thus, it was contended that the document relates to two distinct matters, being lease deed and mortgage with possession, and

by virtue of Section 5 of the Act, the document is chargeable with the aggregate amount of the duties, with which separate instruments would be chargeable. Therefore, the instrument is chargeable with stamp duty under Article 35(c) and Article 40(a). Some audit memo, in this regard has also been produced as Annexure R/1. Then, the impugned communication Annexure-3, 8 and 9 were supported, and it was claimed, that the loan amount of Rs. 2.5 Crores constituted a mortgage with possession. Then, it is contended, that the petitioner has adequate alternative remedy, which has not been availed.

A rejoinder has been filed by the petitioner, contending that to constitute a mortgage, the immoveable property should be a security given by the mortgagor to the mortgagee for the payment of money advanced, while in the present case the transferor has transferred the property on terms of the lease, and the amount deposited is to carry interest. It was also submitted that unlike the case where repayment of money extinguishes the mortgage, in the present case even if the lessor repays the entire money of the deposit much prior to the lease term, still the lease of the property continues till the expiry of the lease term. Thus, the repayment of principal money and interest is not secured on immoveable property. Then, the provisions of Section 67 of the Transfer of Property Act were also invoked. Then, it is contended that the subsistence or

termination of lease and recovery of possession, is in no manner co-related with retention of money by the lessor. Various other stands have been taken which would not detain me.

Arguing the writ petition both the learned counsel reiterated the respective stands taken in the pleadings.

Thus, the precise question requiring to be adjudicated in the writ petition is, as to whether the amount of Rs. 2.5 Crores, as comprised in para 15.1 of Annexure-1, i.e. the deposit of the amount by the lessee with the lessor on the conditions mentioned therein, can be said to be chargeable to stamp duty, whether under Article 35(c) or Article 40(a). The quantum of stamp duty as may be chargeable, in the event of it being found to be chargeable is not in dispute.

In view of the above, I may gainfully quote the provisions of Article 35(c) and Article 40, Section 2(17) which read as under:-

35. Lease, including an under lease, or sub-lease and any agreement to let or sub-let-...

(c) where the lease is granted for a fine or premium or for money advanced in addition to rent reserved.	The same duty as on a Conveyance (No.23) for a consideration equal to the amount or value of such fine or premium or advance as set forth in the lease, in addition to the duty which would have been payable on such lease, if no fine or premium or advance had been paid or delivered. Provided that, in any case, when an agreement to lease, is stamped with the ad valorem stamp required for a lease, and a lease in pursuance of such agreement is subsequently executed, the duty on such lease shall not exceed one rupee.
40 Mortgage deed, not being an agreement relating to Deposit of Title-Deeds, Pawn or Pledge (No.6) Mortgage of a Crop (No. 41) Security Bond (No. 57)	
(a) when possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given;	The same duty as a Conveyance (No.23) for a consideration equal to the amount secured by such deed.
(b) when possession is not given or agreed to be given as aforesaid;	The same duty as on a Bond (No.15) for the amount secured by such deed.
Explanation.-A mortgagor who gives to the mortgagee a power of attorney to collect rents or a lease of the property mortgaged or part thereof, is deemed to give possession within the meaning of this article;	
(c) when a collateral or auxiliary or additional or substituted security or by way of further assurance for the above mentioned purpose where the principal or primary security is duly stamped-	One rupee
for every sum secured not exceeding Rs.1000	
and for every Rs.1,000/-	One rupee
or part thereof secured in excess of Rs.1000/-	
Exemptions	
(1) Instruments executed by agriculturist taking advances from the Government or by their sureties as security for the repayment of such advance.	
(2) Letter of Hypothecation accompanying a bill of Exchange.	

"2(17) Mortgage deed.-"Mortgage deed" includes every instrument whereby for the purpose of securing money advanced, or to be, advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers, or creates, to, or in favour of, another, a right over or in respect of specified property."

It is a different thing that the categoric case of the respondent in Annexure-3 and 8 is about the stamp duty being leviable on the aforesaid amount under Article 35(c), and now the claim is sought to be supported on the basis of Article 40-(a). However I proceed to examine the sustainability of claim on the anvil of either of the provisions.

In my view, a look at Article 35(c), as reproduced above, does show, that in order to attract the leviability of the stamp duty, in respect of the three categories of amounts mentioned therein, being “fine”, “premium”, or “for money advanced”, the sine qua non is, “lease is granted for...in addition to rent reserved”. Obviously meaning thereby, that the amount concerned should constitute consideration for grant of lease, and has to be in addition to the rent reserved. In other words, in any case, either of the three categories of the amount, is to become the asset of the lessor, as constituting consideration of grant of lease, and being in addition to the rent reserved. As against this in the present case, a look at Clause 15 of Annexure-1 does show, that the amount was an advance amount with the lessor, to secure timely payment of rent by the lessee, the petitioner, and in the event of default in payment of rent by the lessee, the lessor was entitled to adjust the amount from out of this advance. Thus in any

case this was not an amount to be retained by the lessor in addition to the rent reserved. Likewise this amount is to carry simple interest @ 9 % per annum, and is to be refunded in 10 yearly instalments, of Rs. 25 lacs each, to commence from 1.5.2055. Thus, it cannot be said that the lease was granted for, or in consideration of this amount. Significantly if the lease is determined earlier, the amount would become payable forthwith, however even if the amount is refunded earlier by the lessor, thereby the lessor does not become entitled to get back the possession of the leased property, as thereby lease does not come to an end.

Learned counsel also relied upon the judgment in M.P. Broker's case, which is a Special Bench judgment of Delhi High Court, and takes the same view in para-11 as under:-

> "11. In the result, we are of the opinion that the duty is not chargeable under Art. 35(c) of Sch. 1-A of the Indian Stamps Act, 1899 on the amount of security/deposit/advance, which is refundable on determination of the lease, in addition to the duty paid on the rent reserved under Art. 35(a) of the Schedule. It will not make any difference in the chargeability of duty, if such deposit/advance is adjustable in rent/other charges/dues payable under the lease. The amount of security deposit paid for the due performance of the contract of lease is chargeable under Article 57 of the Schedule read with S. 5 of the Act."

I am in respectful agreement with the aforesaid

judgment of the Special Bench of the Delhi High Court.

Thus, taken from any standpoint, this amount of Rs. 2.5 Crores does not all fall with any of the amount mentioned in Article 35(c).

Taking up Article 40(a), it comprehends leviability of stamp duty on mortgages, when possession of the property comprised in such deed is given by the mortgagor, or is agreed to be given, then the stamp duty is leviable as conveyance. Then, a look at Section 2(17) quoted above shows, that even thereunder, there should be transfer, or creation of right, over or in respect of specified property, and such transfer or creation of right should be for the purpose of securing money advanced or to be advanced by way of loan, or an existing or future debts or for performance of an engagement. Thus, even under Section 2(17), there should be transfer, and predominant purpose of the transfer should be securing the money advanced or to be advanced by way of loan or debt or performance of an engagement. In the present case, of course, lessor has transferred property to the petitioner, but it has been transferred by way of lease for specified period of time, and the amount taken by the lessor from the petitioner again is not a loan, but is only by way of an advance deposit, which is to carry interest, and is repayable on the specified time. That apart even if the

amount is considered to be loan, the basic element about the transfer of property, being for the purpose of securing the amount, is very conspicuously missing. In other words, the advancement of amount and repayment thereof, and payment of interest etc. are independent transaction, while lease is transfer of property in consideration of lease rent reserved, and is made not for securing the amount received by the lessor, but is made for rent reserved, and for enjoyment for the specified period by the lessor. Even at the cost of repetition it may be observed here, that even if the lessor were to refund the amount at any time before expiry of the term of lease, still ipso facto he would not become entitled to get back the possession of the lease property, or to be further specific, by repayment of the amount by the lessor to the lessee, the transfer of property by the lessor to the lessee, would not extinguish, or come to an end. The transfer of property made by the lessor in favour of the lessee would come to an end only on expiry of the term of the lease, or if the lease happens to be determined earlier. Then advance is also not for securing the performance of any engagement, to be performed by the lessor, either, rather the amount is paid by the lessee as a guarantee that the petitioner, who has made the deposit, will make timely payment of the rent reserved. In that view of the matter, it cannot be said, that making of the advance deposit of Rs. 2.5 Crores by the lessee, at all constitutes any mortgage, or the document Annexure-1 falls

within the definition of mortgage deed, as defined in Section 2(17) of the Act. That being the position, it is clear that even Article 40 is also not at all attracted for levying any stamp duty.

Thus, obvious result of the above is, that no stamp duty is leviable on this amount of Rs. 2.5 Crores, whether under Article 35(c), or for that matter even under Article 40, and thus the impugned orders Annexure 3, 8 and 9 to say the least have no legal basis to stand.

In the result, the writ petition is allowed. Annexures 3, 8 and 9 are quashed, and it is held, that document Annexure-1 is not leviable with any further stamp duty, either under Article 35(c), or under Article 40(a). The bank guarantee given pursuant to this Court's order dt. 25.5.1993 stands discharged. The parties shall bear their own costs.

(N P GUPTA),J.

/Sushil/